



COMMISSION HEARING

TORONTO, ONTARIO – SEPTEMBER 15, 2010

**IN THE MATTER OF THE RACING COMMISSION ACT S.O. 2000, c.20;
AND IN THE MATTER OF THE APPEAL AND REQUEST FOR HEARING BY
WINDSOR RACEWAY**

Windsor Raceway Inc., (“WRI”), appealed the Director’s decision of July 19, 2010, refusing WRI’s application to amend its 2010 approved race date schedule. The proposed amendment would eliminate fifteen race dates (September 26, 28, 29, October 6, 8, 13, 15, 20, 22, 27, 29, November 6, 13, 20 & 27). Thereby total race dates would be reduced from 111 to 96.

On September 15, 2010, a Panel of the Ontario Racing Commission (“ORC”) consisting of Chair Rod Seiling, Vice-Chair James Donnelly and Commissioner David Gorman was convened to hear the appeal.

Angela Holland appeared as counsel for the Administration and Ryan Teschner appeared as counsel for WRI.

Upon hearing the testimony of Steve Lehman – Chief Administrative Officer of the ORC, and Christopher Kruba – Director of WRI, upon reviewing the exhibits filed and upon hearing the submissions of Brian Tropea of the Ontario Harness Horse Association (“OHHA”), counsel for the Administration and counsel for WRI, the Panel denied the Appeal.

The Panel’s Reasons for Decision is attached to this Ruling.

Dated at Toronto this 18th day of October, 2010.

BY ORDER OF THE COMMISSION


John L. Blakney
Executive Director



REASONS FOR DECISION

1. Windsor Raceway Inc. (Windsor) appeals the Director's decision of July 19, 2010 refusing Windsor's July 9 application to amend its 2010 approved race date schedule. The proposed amendment would eliminate fifteen race dates (September 26, 28, 29, October 6, 8, 13, 15, 20, 22, 27, 29, November 6, 13, 20 & 27). Thereby total race dates would be reduced from 111 to 96. The Appeal was dismissed with Reasons to follow. These are the Reasons.

2. OHHA was granted status at the Hearing and made an oral submission neither under oath nor subject to cross examination.

The parties filed an Agreed Statement of Facts as follows:

The Windsor Raceway Inc. (through its Legal Counsel) and Litigation Counsel for the Administration of the Ontario Racing Commission (the "ORC") agree to the following facts:

1. *On July 30, 2009, the ORC issued a Notice to Industry which established the process to apply for a 2010 Racetrack Licence.*
2. *On September 15, 2009, WRI submitted its application for a 2010 Licence to operate a racetrack known as the Windsor Raceway, in Windsor, Ontario. The application proposed a reduction in race dates from 111 in 2009 to 86 in 2010.*
3. *On October 8, 2009, the ORC issued Policy Directive No. 6-2009, which placed a moratorium on race date reductions and required the same number of race dates for 2010 as 2009.*
4. *On October 21, 2009, WRI submitted a Revised Business Case for 111 race dates which involved:*
 - a. *transferring Saturday dates in January, February and November to Sundays;*
 - b. *transferring all allocated May and September race days to Sundays in March, April and a Sunday in October; and*
 - c. *transferring the Wednesday race days in October to Sundays in October.*
5. *By Notice of Decision dated December 1, 2009, the ORC denied WRI's application to change its 2010 race date schedule.*
6. *WRI appealed the December 1, 2009 decision to a Panel of the ORC, and in Ruling Gen 004/2009, dated December 10, 2009, the Panel denied WRI's appeal.*
7. *On February 2, 2010, via a Notice to the Industry, the Deputy Director approved an application by WRI to modify its February 2010 race date schedule by moving four Saturday race dates to Fridays in October, 2010.*
8. *On May 27, 2010, a meeting of the Working Group was convened.*
9. *On July 9, 2010, the ORC received an application from WRI, to amend its approved race calendar for 2010, which proposed the elimination of fifteen race dates, as follows:*



- a. *Eliminate three race dates in September, September 26th, 28th, and 29th, 2010;*
- b. *Eliminate eight dates in October, October 6th, 8th, 13th, 15th, 20th, 22nd, 27th, and 29th, 2010; and*
- c. *Eliminate four dates in November, November 6th, 13th, 20th and 27th, 2010.*

10. *On July 19, 2010, the Director declined to approve WRI's July 9, 2010, application.*

11. *A Notice of Intent to Appeal was received on July 20, 2010.*

12. *A Notice of Appeal was received on July 27, 2010.*

13. *A Notice of Hearing was provided on August 3, 2010.*

3. Windsor's application is the culmination of a sustained attempt to address declining pari-mutuel revenues by the remedy of cutting race dates. Implementation of that policy for the 2010 racing year has been fourfold:

- September 2009 an application proposing a reduction from 111 race dates in 2009 to 86 in 2010. Application denied.
- October 21, 2009, an application to race 86 days including 25 Sunday double-headers for a total of 111 race cards. That application to vary was denied by the Deputy Director whose decision was sustained upon appeal to the Commission.
- By order February 2, 2010, the Deputy Director approved an application by Windsor to move four October race dates from Saturdays to Fridays. Those dates rescheduled at Windsor's request are included amongst the dates now sought to be cancelled.
- The July 9, 2010 application which is the subject of this Appeal.

4. The racing industry is confronted by the enduring challenge of declining fan support at the turnstiles and the mutuels. That general issue is exacerbated in Windsor's case by a variety of local issues including horse supply, a rock bottom purse structure, a local economy depressed beyond the norm by the convulsion in the auto industry, the resurgence of the Canadian dollar and more stringent border crossing conditions which produce inconvenience and delay. Compounding those chronic difficulties has been the aftermath of a recent investigation of alleged race-fixing centered upon three prominent drivers at Windsor Raceway. Public disclosure of that investigation was subsequent to the Director's Ruling and prior to the hearing of this appeal. The Racing Commission is fully cognizant of the industry-wide wagering and attendance issues which have endured beyond early expectation and now require effective response. The Racing Commission is equally aware of the compounding features specific to Windsor's situation. The point of departure for the Commission and Windsor is the nature of the proper response.

5. Confronted by a wide-spread and escalating clamour to cut dates, the Commission, seeking a more rational and principled approach to race date allotment issued Policy Directive 3-2007 (appended hereto). Thereby factors for consideration were identified as follows:

1. Customer satisfaction and demand for product
2. Adequate purse levels



3. Racing opportunities and available horse supply
4. Financial condition of the racetrack association to deliver
5. Harmonization of date schedule with other Ontario racetracks
6. Motivation to engage in the conduct of live racing

6. By virtue of Policy Directive No 3-2007 the applicant for a mid-season change of race dates such as this one bears a more stringent burden of proof. In the case of an already approved race date schedule that elevated burden is to the extent that:

“the ORC is firmly convinced that change is warranted and will prove the greatest benefit...with an increased burden upon the applicant to demonstrate the positive benefits to all stakeholders.”

7. The “Slots at Racetracks” program has created a dual revenue system, firstly from slots, secondly from horse racing, live and simulcast. The racing stream, although not the pot of gold, is the access to the casino pot of gold. Absent a racetrack there would be no casino. In result there is one gaming operation with two revenue streams.

8. The slot revenues are beyond reasonable compensation for leasing the casino and parking site to the OLG. In return for that bountiful compensation, the site holder is obliged to support racing and thereby a vast segment of the agricultural community, a major rural industry.

9. The less robust revenue stream is racing. The racing operation requires management and entails expense. Although the entire gaming operation may be profitable, viewed in isolation not so the racing sector. Windsor’s race date strategy is elimination of the least productive dates. This is self-perpetuating as elimination of one date renders vulnerable the next least profitable date.

10. The gravity of the situation is reflected in Windsor’s business plan in support of the 2010 race date change application which concludes “then WRI race dates could fall further to 56 days by 2012.”

11. A reduction in race dates:

- Leads to a diminished mutuel handle and thereby to the amount that the mutuel handle contributes to the purse account.
- Provides fewer opportunities for horsemen to compete for purse money.

12. There is a “trickle down” effect following curtailed race dates which influences horse supply and the long term broad effects of fewer foals and the jobs that their care and development produce.

13. Track operators enjoy the slots prosperity and endure the race track obligation. The Slots at Racetracks Program was intended to support the racing sector of the agricultural industry. The agricultural economy is a government concern, providing massive opportunity for employment and self-employment through small business.



14. The track's benefit is to receive slots proceeds for very little effort. The track's burden is to support live racing. The racing program may be subject to fluctuation in attendance and mutual handle. The response is not to divest racing. The obligation is to provide racing. The option is to make racing less painless by marketing strategies.

15. The opportunity remains to rehabilitate the racing sector by marketing measures and promotions – as has been done by many tracks with varying degrees of vigour and success. Customer and horse people's goodwill can be actively cultivated. That cultivation may be impeded by cost considerations. Seemingly minor decisions can be impactful on customer relations. An example at Windsor, rather than having race programs available for sale to customers, a printing or photocopying machine is in place. Customer lines up, inserts his/her \$2, the machine produces individual sheets and customer staples the sheets together and moves on to make way for the next customer in line. In this scenario, costs maybe reduced but at what expense in customer relations terms and track ambiance.

16. The ORC strategy is to elevate that racing rehabilitation from track to track status to an industry-wide program. The ORC approach on the race date issue has evolved progressively. Revision commenced with Policy Directive No. 3-2007. By that Directive, race date schedules were continued year to year subject to applications to change. In the fall of 2009, race date proposals by various tracks sought elimination of a cumulative total of about 150 race dates. This radical departure from the existing structure prompted ORC Policy Directive No. 6-2009 ordering a moratorium on race date reductions. That Directive issued October 8, 2009. Windsor's application under appeal is dated July 9, 2010. The moratorium was in force on the date of this application.

17. The Director's response to the Windsor application was made during the moratorium period. That the moratorium was not absolutely inflexible was demonstrated at an industry meeting attended by Patrick Soulliere, President of Windsor Raceway. At that meeting of Friday, May 28, 2010, the Director responded to a claim of financial distress from Hiawatha Racetrack. The theme of the Director's response was that the ORC was not about to put a track out of business. Hiawatha was advised, as confirmed by the Director's notes made at the meeting, that a relief plan could be put in place as matters progressed. Hiawatha was able to deal with its alleged financial problem without ORC intervention.

18. Windsor with knowledge of the availability of such relief had opportunity to furnish information in support of and to request such ORC hardship intervention. Windsor's attention to financial issues is directed by the fourth factor in Policy Directive No. 3-2007 (#6 in Windsor's application) "Financial Condition of The Racetrack Association to Deliver". The information furnished by Windsor under that heading was restricted to the following:

"WRI continues to reorganize its financial affairs to survive the difficult economic times being faced by businesses in Windsor and Essex County. Although still clouding the future of WRI, the 2010 calendar at Exhibit "A" is a beginning of the changes necessary to ensure the long-term survival of live racing in Windsor and Essex County."

19. No specifics were given. No plea was made similar to that of Hiawatha. Special individual circumstances would have been recognized in case of deserving hardship notwithstanding the



moratorium. A discretion was available to the Director and known by Windsor to be available. The application of the moratorium policy by the Director was correct in those circumstances.

20. The OHHA submissions presented by Brian Tropea have been of substantial assistance in dealing with Windsor's problem. Windsor Raceway is an indispensable sector for western Ontario racing. It enjoys a significant mutuel handle which should be nurtured for the good of racing generally. The elimination of race dates at Windsor should be avoided pending implementation of the ORC restructuring initiative.

21. In September 2009, confronted with a significant decline in race dates applications, the Commission instructed the Executive Director to undertake a collaborative industry analysis leading to a fact based determination of the number and distribution of race dates. In order to avoid a race date onslaught during the process, the moratorium was imposed. The purpose was to ensure a principled industry approach and remedy. The intention was to preserve the status quo pending an industry-wide review of race date allotment and associated issues. The governing premise was that cutting race dates was a superficial, ineffective remedy.

22. Windsor's problems are centred upon purse structure and horse supply. The reality is that horse supply follows bountiful purse money. A full field of competitive horses attracts wagering which supports the money cycle. Accordingly, Windsor's relief must come from realignment of purse structures and with it, horse supply. The ORC regarded this as the correct remedial path.

23. During the course of the moratorium, the ORC organized the remedial process involving an advisory group, an industry consultation group, a working group, technical groups, general industry input and the ORC Administration. Founding principles were established. Concepts were explored. Components of a solution emerged with such as racetrack classification, classification of racing, management of horse supply, standardization of race conditions, purse management with distribution aligned with pari-mutuel markets, aligning horse supply with demand, a management system for live racing and simulcasting and greater accountability and oversight in the industry.

24. This industry realignment was broadly and strongly supported. At the conclusion of that process, on September 9, 2010, the Commission approved in principle a Framework for race date allocation. The moratorium ended with adoption of the Framework which becomes effective January 1, 2011. With that Framework having been identified, the revised race date model continues to develop and will be the basis for allotting 2011 race dates.

25. The Framework will be refined by the Administration and the industry through the 2011 race date allocation period. With continuing industry input, long term implementation will evolve. A September 10, 2010 News Release introduced the ORC approval of the Framework to the industry.

26. Given that massive industry realignment, all premised upon the conclusion that cutting race dates is too simplistic an approach, Windsor's application could not succeed. As matters progress, race dates may well be cut. If so the reductions will be premised upon a principled approach not on a random hit and miss basis.



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27. The Framework for race dates is an industry-wide strategy. Its implementation will require participants to think beyond today and seek a glimpse of tomorrow. The individual vision should not be restricted to “what’s in it for me” but should include “what’s in it for the industry”. For these reasons, Windsor’s application was dismissed.

28. In passing, during the course of the appeal, Windsor made reference to the fact that the Administration did not seek further information from Windsor following filing of its application. The burden is upon the applicant to prepare its case.

DATED this 18th day of October 2010.

Rod Seiling
Chair

James M. Donnelly
Vice Chair

David Gorman
Commissioner